LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 480

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN, ROBERT R. RICHARDSON and WILLIAM R. INGRAHAM, Petitioners

v.

EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

BRIEF FOR RESPONDENT

EDWARD O. SPOTTS
MELVIN M. BELLI
THEODORE M. TRACY
Attorneys for Respondent

417 Frick Building
Pittsburgh 19, Pa.

SMITH BROS. CO., INC., LAW PRINTERS, 436-438 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX TO BRIEF

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Counter-Statement	4
Reasons for Refusing the Writ	10
Conclusion	30

TABLE OF CITATIONS

Cases

Baxter v. Wunder, 89 Pa. Super. 522	27
Brown v. Ingraham, 11 F. R. D. 522	28
Darby v. Philadelphia Transp. Co., 73 F. Supp. 522	27
Durkin v. Kingstone Coal Co., 171 Pa. 193	14
Fidelity Union Trust Co. v. Field, 311 U. S. 169	16, 19
Heikes v. New York Life Ins. Co., 171 F. 2d 460	25
Mast v. Illinois Central R. Co., 176 F. 26	25
Remington's Dairy v. Rutland Ry. Corp., 15 F. R. D. 489	28
Signa Johnston, Admrx. v. B. & O. RR., 208 F. 2d 633	12
Soberg v. Sanders, 243 Mich. 429	28
Ulbrich v. Boone County Coal Corp., 160 D. & C. 315	14
Weaver v. Marcus, et al., 165 F. 2d 862	28

Statute, Rules, Texts, Etc.

Crane on Partnership 276	28
Mechems Elements of Partnership, Sect. 312	28
Pa. Uniform Partnership Act, 1915, P. L. 18	25
Rule 51, F. R. C. P., 28 U. S. C. A. following Sect. 723C	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 480

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN, ROBERT R. RICHARDSON and WILLIAM R. INGRAHAM, Petitioners

v.

EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court is reported at 143 F. Supp. 816. The opinion of the Court of Appeals is as yet unreported. It is stated at page two of petitioners' Brief that sufficient copies of the said opinion of the Court of Appeals have been filed with the Clerk of this Court, and that nine copies of the appendices filed by the parties with the Court of Appeals have been filed with the Clerk of this Court.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1254 (1). The questions presented by the petition for Writ of Certiorari, even as drawn by the petitioner in an attempt to invoke this Court's jurisdiction, do not constitute such matters of

importance, general interest or procedure, as to warrant the granting of the Writ requested.

As will be demonstrated in Respondent's argument, infra, those issues attempted to be raised by the petition are not supported by the record, and when the petition is examined in the light of the record, it is patently devoid of merit.

QUESTIONS PRESENTED

1. Where the principles enunciated in a logical and well reasoned local lower court opinion, precisely in point, have never been disapproved or discredited by the higher state courts and are instead consonant with the general law of the state in the applicable appellate decisions, is it not proper for the Court of Appeals in a diversity case to reverse the District Court's judgment based on an erroneous conception of the local law contrary to those decisions?

In other words, where a private hospital undertakes for profit to render care and treatment, and its employee in the performance of such contractual undertaking negligently injures the patient, is not the liability of the hospital owners to be determined in accordance with state law pertaining to the precise facts rather than mere statements in cases involving entirely unrelated factual situations?

2. Where a release or indemnity agreement is confined by its own terms to "any damages on this account" and those words refer directly to the administration "of recognized medical treatment" and the damage allegedly released was caused by administration of *un*recognized

medical treatment, were not the courts required to hold such language inapplicable, particularly where local law compelled a strict construction against the applicability of such agreements?

3. Where, under a proper instruction the jury found petitioners liable to respondent on the basis of the contractual undertaking, but the trial court thereafter on petitioners' motion set aside the judgments entered on the verdicts, was not the court's error in so ruling a proper subject of appeal by respondent?

Where, on such an appeal, the Court of Appeals reversed the District Court's said ruling, is the validity of that reversal subject to challenge merely because the Court of Appeals expressed the additional view that the District Court had also been wrong in ruling on the motion for directed verdict during the trial, that an alternate theory of liability suggested by respondent was inapplicable, particularly where the court had made its definite ruling on the record against the alternate theory of liability and in opposition to vigorous argument by respondent's counsel?

4. Where a Court of Appeals, reviewing a district judge's conception of local law is convinced that the judge has not given proper consideration to the applicable decisions within the state but has instead adopted his personal impression of the law by consideratioin of inapplicable decisions, is it not proper for the Court of Appeals to decide the case in accordance with the applicable local law and reverse the judgment of the District Court?

5. Where diversity exists as to all parties to an action and there are no other persons or entities who

are necessary or essential and there is not and cannot be a judgment against anyone other than the parties so named, does not jurisdiction exist in the federal court?

COUNTER-STATEMENT

Respondent is Executrix of the Estate of George R. Brown, her late husband, who died from negligently treated injuries received in a negligently induced fall, while he was a paying patient in a private sanitarium, owned and operated solely for profit by certain individuals, including the petitioners herein (T. 350). Respondent is and always has been a citizen of Pennsylvania. Those petitioners, who were sued by the respondent, all live in states other than Pennsylvania (T. 7).[1]

Brown, a thirty-two year old metallurgist, had developed an anxiety neurosis during the summer of 1949. He was the father of three small sons. The older two were aged six and four and the youngest was born five weeks before Brown died. Mr. Brown went to petitioners' sanitarium, seventy miles north of his home in Pitts-

---

1. The first four petitioners named in the caption (Martha R. Moore, William W. Richardson, Jr., Julia R. Corbin and Robert R. Richardson) were sued by respondent. Throughout the seven years this case has been in litigation the first four petitioners were represented by Harold E. McCamey, Esquire, and the law firm of Dickie, McCamey, Chilcote, Reif & Robinson. They caused the fifth petitioner, William R. Ingraham, to be joined as a Third Party Defendant. The said Third Party Defendant has throughout the litigation been represented by Milton W. Lamproplos, Esquire of the law firm of Smith, Buchanan, Ingersoll, Rodewald & Eckert. It is significant to note that all five petitioners are now represented solely by Milton W. Lamproplos.

burgh, at the suggestion of the specialist, who had been treating him in Pittsburgh.

The medical facilities of petitioners' sanitarium were in charge of a Dr. John L. Kelly, whom the owners had designated as the Medical Director (T. 28). Prior to Mr. Brown's admission, neither he, his family nor his personal physician had ever heard of Dr. Kelly (T. 300). There was no evidence in the lengthy record that Brown employed or paid or agreed to employ or pay Dr. Kelly for his services. However, Brown did agree to pay and did pay the petitioners' sanitarium for that care and treatment (Exhibit A).

The care and treatment rendered Mr. Brown was afforded by registered and practical nurses, nurses aides and by Dr. Kelly, all of whom were employed and paid salaries by the petitioners (T. 349-355). Dr. Kelly's salary did not depend on the number of patients treated nor the type of treatment which he afforded (T. 340). The usual deductions such as social security, etc., were made by petitioners from Dr. Kelly's and the other employees' salaries (T. 346). In addition to paying his salary, petitioners gave Dr. Kelly a residence on the sanitarium's grounds and some of his maintenance. He was on call twenty-four hours a day (T. 344). Petitioners permitted Dr. Kelly broad managerial powers with regard to the medical facilities and personnel, and he was granted the right to "diagnose and such" (T. 26-46). Dr. Kelly was also advised by petitioners' representative that he would have a very broad authority and would in fact act more or less as a partner of "The sanitarium owners" (T. 46). The owners also retained the right to discharge Dr. Kelly at any time (T. 348-354). In their original pleadings, the petitioners failed to deny the alle-

gations in the Complaint regarding the fact of Dr. Kelly's agency. Only by an amended Answer filed approximately two and one-half years later did they make such a denial.

Petitioners' own record showed that there was a definite contractual relationship between the petitioners and Brown regarding medical care and treatment (Exhibit A-27b). By the same token, there were no obligations or duties assumed by or between Dr. Kelly and Brown (See the entire record). On Brown's admission, he and his wife signed the petitioners' printed admission card, giving "THE MERCER SANITARIUM permission to administer any form of *recognized* medical treatment, including Electro-Shock Therapy to George R. Brown, deemed advisable by the Medical Staff of said Sanitarium, and does hereby release THE MERCER SANITARIUM and its employees from any damages on *this* account."[2] In authorizing the expenses to be charged to her and agreeing to pay the bills, Mr. Brown's wife alone signed another printed paragraph on the same admission card, agreeing to indemnify The Mercer Sanitarium from any loss resulting from injury to or injury or damage caused by George R. Brown (Exhibit A-27b).

During his third day, Mr. Brown was given a shock treatment and later fell down the steps, which he was permitted to descend unattended (T. 8-64-172-180). The cause of the fall was shown to be due to hysteria (Exhibits 5-6-7). As a result of the fall, he sustained a fracture-dislocation of the neck (Exhibit 2). All the treatment afforded thereafter by petitioners' staff was shown to be directly contrary to that indicated by the very obvious symptoms of the true pathology. This

---

2. Emphasis supplied.

treatment and lack of treatment was of such magnitude that one of petitioners' own expert witnesses was forced to admit under cross-examination that it "was too bad" Brown had not been attended by Boy Scouts rather than by the petitioners' staff (T. 504).

After four days of such treatment, Brown died. Respondent first instituted a suit against petitioners in the United States District Court for the Western District of Pennsylvania (Civil Action No. 9071). On the next day, a cautionary suit was also filed in the local state court. Because of a technical error in the suit first filed in the United States Court, respondent 2 days later filed this action in the same United States District Court to take the place of the action first filed. Subsequently, the first action was dismissed on stipulation without prejudice and respondent, pursuant to the applicable rules, instructed the state court to enter a voluntary nonsuit in that action which the state court refused to enter.

At the trial, respondent submitted in evidence such records and testimony as were available, demonstrating the relationship existing between petitioners and Dr. Kelly as hereinabove set forth. Much of that evidence was adduced through a witness who is one of the petitioners herein.[3] At the close of respondent's case, the trial court, over respondent's strenuous objection, entered a ruling that the negligent employees were independent contractors (T. 435). The Court then submitted the case to the jury on the alternate theory of liability, based on the alleged tortious breach of petitioners' contractual obligation to afford Brown such reasonable care and skill as his condition indicated and re-

3. William R. Ingraham.

quired (T. 436-704-705-706). The jury found that the petitioners had negligently performed those duties and returned verdicts in favor of respondent totalling $60,000.00.

Petitioners filed motions to enter judgment in accordance with their motions for directed verdicts, or in the alternative to grant a new trial or to dismiss the action on jurisdictional grounds. The District Court ruled that there was ample evidence to support the verdicts as to negligence and damages and that the verdicts were not against the weight of the evidence (29a 30a). The District Court also held that jurisdiction was properly laid in the Federal Court and refused to dismiss the case on jurisdictional grounds (26a).

However, the District Court, on the basis of dicta in certain unrelated cases, conceived the law of Pennsylvania to indicate a reluctance to extend liability for negligence to an employer whom the Court deemed not to be in personal control of the negligent employee.

From the judgment entered by the District Court, setting aside the verdicts rendered by the jury in her behalf, respondent appealed to the Circuit Court of Appeals for the Third Circuit, contending that in ruling as it did, the District Court had failed to apply the doctrine established by the decision of the United States Supreme Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, by refusing to follow local lower court authority directly in point, which was strongly supported by those Pennsylvania appellate decisions most closely in point, The Restatement of the Law and by the tremendous weight of respected foreign authority.

The Court of Appeals for the Third Circuit held the Pennsylvania lower court decision to be directly in point, that it was a well reasoned opinion, was not at odds with any appellate pronouncement within the state and was in fact supported by dicta in those cases most closely in point decided by the state's highest appellate court. The Court of Appeals then reversed the judgment of the District Court and ordered the respondent's verdicts reinstated. In so holding, the Court of Appeals ruled that the District Court had properly submitted the case to the jury on the theory that by contracting with Brown for medical services, the petitioners had undertaken a non-delegable duty to perform such services in a proper and reasonable manner (Page 11).

No appeal was taken by the petitioners from the refusal of the District Court to dismiss the actions on jurisdictional grounds. The Court of Appeals by its opinion also held that the clause on the admission card, proporting to be a release, did not constitute a release of the claim on which the action was founded. The Court of Appeals further held that the clause on the admission card concerning indemnity was too vague to be given effect as such since the law of Pennsylvania requires such agreements "to be construed strictly 'with every intendment against the party seeking its protection.'"

Petitioners requested a re-argument before the Court of Appeals which was denied.

REASONS FOR REFUSING THE WRIT

1. The decision, and the entire basis for the decision, of the Court of Appeals in this case is in complete accord with the principles enunciated and established by Erie R. Co. v. Thompkins, 304 U.S. 64, and all the related cases and statutes cited in petitioners' brief. It was because of the District Court's failure to comprehend its duty and apply those principles that an appeal was necessary and a reversal was mandatory in this case.

It is impossible to be so charitable with the petitioners. They have not merely failed to comprehend the duties imposed by *Erie R. Co. v. Thompkins*, and those later cases following, extending and applying its doctrine. The brief submitted in support of the petition is a compound mis-statement of the facts and law involved in this litigation.*

*A shocking illustration of such tactics appears at page 26 of the petition. It is there stated that the Court of Appeals admitted that the determination of the District Court as to Dr. Kelly's status as an independent contractor and that petitioners were not liable for malpractice has support "in the law of some States, perhaps of a majority . . ." Careful examination of the opinion shows that no such admission was made and that the alleged quotation does not appear in the opinion but is concocted by petitioners out of independent and separate statements at pages 6 and 7 of the opinion. It is to be noted also that even had the alleged quotation been accurate it would still be out of context, as it appears in the petition, concerning anything which the court did actually say. If the quotation were accurate it would still ignore the further statement by the Court of Appeals (page 7) that the validity of any such rule had been absolutely swept away by the opinion of the New York Court of Appeals in the very recent case of Bing v. St. John's Episcopal Hospital, ...N.Y. ....., ... N.E. 2d .... (1957). Other instances of similar tactics by petitioners are noted, infra.

It is perhaps immaterial to call attention to the fallacy of the petitioners' averments that the evidence rebutted the fact of a master-servant relationship existing between the petitioners and their employed doctor. It is immaterial because the decision from which this petition is taken is based not on the legal effect of the relationship between the petitioners and their employee, but on the legal relationship existing between petitioners and the respondent's deceased husband. That this is so is clearly declared in the opinion of the Court of Appeals as follows (page 11):

> "But even if we assume—though we think that such an assumption would be erroneous—that the Supreme Court of Pennsylvania would rule that Dr. Kelly under the circumstances at bar was an independent contractor, there is another cogent factor which we think would compel the Courts of the Commonwealth of Pennsylvania to hold the defendants liable in the case at bar.
>
> "What is that factor? We are of the opinion that where there has been a *holding out, a representation* to a patient or to his family as members of the public, that medical treatment is to be administered in a private hospital or sanitarium by a doctor employed therein, the Courts of the Commonwealth of Pennsylvania would apply the doctrine of *respondeat superior* and hold the owners or operators of the sanitarium liable for the mal-practice of the doctor. In other words, Doctor Kelly could be regarded as having the status of an independent contractor in his relation to the partners in the sani-

tarium but in his relation to Brown would be deemed an employee of the Sanitarium." (Emphasis added)

It was on this basis—that is the relationship between the petitioners' Sanitarium and the decedent—that the verdicts were rendered (T. 704-705). The District Court refused to submit the case to the jury on the alternate theory of an actual master-servant relationship (T. 435). Though, as we have already pointed out, the validity of the judgment was in no way dependent on the actual existence of control over the doctor, since it has been erroneously stated that the evidence conclusively established the lack of control, we feel constrained to point out that all the factual evidence of the relationship, demonstrated that Dr. Kelly was strictly an employee and as such subject to very real control. The only evidence to the contrary was the statement of the witnesses' *conclusion* that Dr. Kelly was not subject to control and was an independent contractor. Respondent was not necessarily bound by these conclusions since the witness who stated them was one of the petitioners and antagonistic to respondent. The law concerning the inconclusiveness of such statements is to be found in *Signa Johnston, Admrx. v. B. & O. R. R. Co.*, 208 F. 2d 633 (3 Cir. 1953).[4]

Returning to the material issues, we note with amazement the declaration that the case was not tried on the basis of the relationship existing between decedent and petitioners' Sanitarium. Every bit of evidence

---

4. It was there stated, at page 635, that such testimony is not necessarily binding or conclusive upon the party calling the witnesses. The case reviewed a decision based on Pennsylvania law.

available was submitted on that very point. The reasons and circumstances of Brown's trip to the Sanitarium were developed at length (T. 8, 193, 362, 364). The circumstances and, so far as permitted, the conversations surrounding his admission and treatment, were put in evidence (366-373). The representations in the written parts of the contract between the parties were admitted as exhibits (Exhibit A, T. 51, 370-372). During the trial it was clearly stated that the case would be submitted to the jury on that theory (T. 436) and the case was submitted to the jury on that theory (T. 706). There absolutely was no rebuttal of the existence of the representation or of the relationship between the parties. (See the entire record). There is not a single authority in Pennsylvania legislative or judicial—express or implied—which prohibits the application of such a theory. The cases cited by petitioners' (footnotes 3, 5, 7 and 8) are in no way in point with respect to that theory. They deal solely with classic master-servant situations and do not bear in any way on the theory of liability through contractual representation on which the case was tried, submitted to the jury and on which the decision of the Court of Appeals reversed the District Court.

There is absolutely no merit in the assertion that because the practice of medicine by unlicensed persons is prohibited by statute, respondent and her husband could not have understood that Dr. Kelly was acting as the petitioners' employee. Even if they were presumed to know the law, the actions, circumstances and writings created by the petitioners could not but lead persons dealing with them to assume that petitioners were quali-

fied to render the services contracted for and for which the patients agreed to pay petitioners. They were in no way put on notice to examine the qualifications of the petitioners to see whether the appearances created were true or false.

The case of *Durkin v. Kingstone Coal Co.*, 171 Pa. 193, 199, 201, 203, 33 A. 239, cited by defendant is readily distinguishable. In that case a Pennsylvania statute was held unconstitutional because it imposed liability on certain companies for the negligence of a foreman who had to be selected from a group of persons specially licensed by the state. Liability in the instant case is not imposed by statute and the petitioners were at all times at perfect liberty to escape liability simply by foregoing the profits of medical practice and/or by avoiding appearances to prospective patients that they were dispensing medical services.

The most amazing assertion in the petition is that there is no Pennsylvania authority to support the legal proposition upon which the verdicts were based and the Court of Appeals' decision was founded. Time and time again, throughout this lengthy litigation, the case of *Ulbrich v. Boone County Coal Corporation,* 160 D. & C. 315-316 has been cited. That case was reported in 1931 by the Court of Common Pleas of Philadelphia County, Pennsylvania. It has never been overruled or disapproved in any particular. There is no appellate court case which by dictum or otherwise detracts from its validity. It was quoted at length by the Court of Appeals which recognized that because it was not an appellate decision, it was not binding (citing Eckman v. Baker, 224 F. 2d 954 (3 Cir. 1955)). This case involved

a company which employed a physician to treat its employees. The company collected sums from the employees to pay for this service. It appeared that the sums collected exceeded the cost of the service and the company thus made a profit. An employee negligently treated by the doctor sued the company which interposed the defenses presently advanced by petitioners. The Court stated:

> "[T]he defendant has stated the general principles that the doctrine of respondeat superior does not apply in the case of injury done to an employee by the unskillful or careless treatment of a physician employed to treat the employees of a company; that one who employs a physician to administer to others without profit to himself is liable only for the failure to exercise due care in the selection and choice of a competent and skillful physician.
>
> "While these principles are sound and recognized generally, they have no application to this case because of the averment in the statement [of claim] that the *defendant furnished these services to its employees for profit. Such being the case, the defendant is in no better position than one who holds himself out to offer medical treatment for gain, who is, under such circumstances, brought within the rule of master and servant and, therefore, liable for the carelessness or negligence of its employees . . .*"[5]

The operative facts in both the Brown and Ulbrich cases were identical with the exception that Brown

---

5. Emphasis supplied.

might much more rationally presume that sanitarium owners were qualified to tender the proffered medical services. In both cases the defendants sought to profit from the practice of medicine by an employee and then when things went wrong to deny liability on the basis of their lack of qualifications to personally perform such services. We submit that the Court of Appeals was more than justified in accepting the logic and justice of such a decision. It was also supported by the authority of this Court in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-178 (1940).

The petitioners have entirely ignored, and in fact denied the existence of, the Ulbrich decision and thereby have clearly revealed the invalidity of all their other arguments. The District Court in setting aside the verdicts for respondent dealt almost as inadequately with the Ulbrich decision (25a). It simply stated, without citing any authority, that it conceived the law of Pennsylvania to be otherwise and without any justification, that the Ulbrich case was dependent on reasons of public policy stemming from the facts there involved. These conclusions of the District Court were completely at odds with each other. No attempt was made to explain what considerations of public policy applied in the Ulbrich case which were not at least as applicable to a patient submitting himself for treatment to a privately owned sanitarium operated for profit.

In accepting the validity of the Ulbrich decision, the Court of Appeals was justified by these additional factors. First, there was nothing in the appellate decisions of Pennsylvania detracting therefrom. Second, dictum

in a recent Penna. Supreme Court case[6] indicated that a doctor or other professional employee might be regarded as the servant of a hospital. Third, the only reason ever advanced by the Supreme Court of Pennsylvania for denying liability in the case of *public charitable* hospitals was that their funds constituted a public trust.[7] Fourth, Pennsylvania admittedly follows the Restatement of the Law where it has not been expressly rejected and the Restatements support the conclusions reached at the trial of the Brown case and in the Ulbrich decision.[8] Fifth, there are Supreme Court decisions in Pennsylvania applying the same principles in non-medical cases.[9]

6. McConnell v. Williams, 361 Pa. 355, 367-8, 65 A.2d 243, 249 (1949), cited at page 10 of the opinion by the Court of Appeals.

7. See for example Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910), cited at page 8 of the opinion by the Court of Appeals.

8. Restatement of Torts Section 429 states: "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for bodily harm caused by the negligence of the contractor in supplying such services to the same extent as though the employer were supplying them himself or by his servants."

See also Restatement of Agency Section 214, comment (a); Restatement of Agency Section 220, comment on subsection (1); and Restatement of Agency Section 223.

9. Simpson et ux., v. Southern Pennsylvania Traction Co., 260 Pa. 526, 529-30, 103 Atl. 884 (1918). See also Prethrow v. West Jersey & Seashore Railroad Company, 214 Pa. 112, 114, 63 Atl. 415 (1906). There are other similar citations to be found in the cases herein noted. At page 5 (footnote 6) of the opinion of the Court of Appeals, there is an additional list of other Pennsylvania cases so holding.

Sixth, this theory of liability has been accepted in private hospital cases by the tremendous weight of foreign authority.[10]

Under these facts and this law, it was hardly appropriate to characterize the carefully considered opinion of the Court of Appeals as a "guess". It goes without saying that had its opinion been otherwise, there would have been ample cause for the respondent to petition this Court invoking the doctrine of *Erie R.*

---

10. 26 American Jurisprudence 598; Hedlund v. Sutter Medical Service Co., et al., 51 Cal. App. 327, 124 P. 2d 878, 881 (1942); Hawthorne v. Blythewood, (Connecticut) 174 Atl. 81, 84; Durney v. St. Francis Hospital, (Del. 1947) 83 A. 2d 753, 758; Garfield Memorial Hospital v. Marshall, 204 F. 2d 721 (C.A.D.C. 1953); Parrish v. Clark, 145 So. 848, 850 (Fla. 1933); Piedmont Hospital v. Anderson, 16 S. E. 2d 90, 98 (Ga. 1941); Corey v. Beck, 72 P. 2d 856 (Ida. 1937); Crump v. Garfield Park Sanitarium, 147 Ill. App. 7, 16 (1909); Grigalauskas v. United States, 103 F. Supp. 543 (D.C. Mass. 1951); Lexington Hospital v. White, 245 S.W. 2d 927 (Ky. 1952); Mills v. Richardson, 137 Atl. 689 (Maine 1927); Moeller v. Hauser, 54 N.W. 2d 639 (Minn. 1952); Gilstrap v. Osteopathic Sanitarium Co., 24 S.W. 2d 249 (Missouri 1929); Broz v. Omaha Maternity and General Hospital, 148 N.W. 575, 578 (Neb. 1914); Burnham v. Stillings, 79 Atl. 987, 988 (N.H. 1911); Hannon v. Cooper Siegal Co., 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 430 (1901). *This is the leading case on the entire subject which is cited throughout the authorities.* Tulsa Hospital Assoc. v. Juby, 175 Pac. 915 (Okla.); Giusti v. C. H. Weston Co., 108 P. 2d 1010, 1013 (Ore. 1941); Sepaugh v. Methodist Hospital, 202 S.W. 2d 985 (Tenn. 1947); Edwards v. West Texas Hospital, 89 S.W. 801 (Tex. 1935); Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, 157, 3 S.E. 2d 152 (1939); Jenkins v. General Hospital, 90 W. Va. 230, 235, 110 S.E. 560 (1922); Treptau et al. v. Behrens Spa, Inc., 20 N.W. 2d 108, 114, (Disc. 1945).

Co. v. Thompkins. A District Court is simply not at liberty to ignore a local lower court opinion without substantial cause and arrive at some other "conception" of the law on the basis of the merest dicta in an unrelated line of cases, particularly when the law of the lower court is consonant with the general law of the state and with practically all other respected authority. If *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, supra, means anything, it was applicable here and required the decision rendered by the Court of Appeals. As long as the Court of Appeals will recognize such principles, and control the District Courts within their jurisdiction from substituting their personal conceptions of the local law, *Swift v. Tyson,* 16 Pet. 1, surely cannot be resurrected.

The arguments advanced in the petition with reference to the alleged release and indemnity are just as easily answered. Releases and indemnity agreements must be interpreted strictly in accordance with their terms. The alleged indemnity agreement is so vague that it could not possibly be given effect as an agreement to indemnify for the liability here involved under Pennsylvania law. There is nothing about the language which could be regarded as contemplating mal-practice.[11] This is so even without relying on the familiar Pennsylvania rules that such agreements are construed strictly, both against the party drawing them and the party seeking their protection.[12] But even if the alleged indemnity

---

11. The obvious intent was to indemnify for self inflicted injury or damage caused by Brown himself.

12. Metropolitan Casualty Ins. Co. of New York v. Eanks, 76 F. 2d (C.C.A. Pa. 1935); Associates Discount Corp. v. Griesinger, 103 F. Supp. 705 (D.C. Pa. 1952);

agreement expressly and particularly specified the claim here in question, it would still be ineffective. The alleged agreement was signed only by "Emma Jean Brown" the then wife of the patient. It was not signed by Brown and it was not signed by the representative of his estate, and it was not signed by the guardian of the estates of Brown's young sons, all of whom were entitled to recover, and therefore could not defeat this action.[13]

That the release was totally inapplicable is also very clear. It is expressly limited to "damages on this account". The quoted words refer directly to the administration of "recognized medical treatment, including Electro-Shock Therapy". *George Brown did not die as a result of receiving recognized medical treatment or Electro-Shock Therapy.* Had he died as a result of receiving recognized medical treatment, there would have been no mal-practice cause of action. The Court and jury has been satisfied that the treatement resulting in the damages here involved was "*un*recognized" treatment for the symptoms manifested by the patient. Thus, without again calling on the rules requiring a strict construction, this clause expressly applies only to claims other than those involved in the present litigation.

Com. to use of Herzog v. Henry W. Horst Co., 364 Pa. 403, 72 A. 2d 131 (1950); Davis v. Wilson, 166 Pa. Superior Ct. 462, 72 A. 2d 148 (1950); Manufacturers & Merchants Building Loan Ass'n. v. Willey, 321 Pa. 340, 344, 345, 183 A. 789 (1936); Camden Safe Deposit & Trust Co. v. Eavenson, 295 Pa. 357, 364, 145 A. 434 (1929); Perry v. Payne, 217 Pa. 252, 258-9, 66 A. 553, 11 L.R.A. (N.S.) 1173 (1907).

13. Donnelly v. Fred Whitaker Co. et al., 364 Pa. 387, 72 A. 2d 61.

2. The Court of Appeals ruled only on those issues which were properly before it on appeal.

There are two separate clear and complete answers to the issue which petitioners attempt to invoke under Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723C.

The first answer simply is that the Circuit Court entered its ruling in this case on the basis of its decision with respect to the theory on which the case was submitted to the jury and which, over respondent's objection, the District Court subsequently declared to be invalid. It was from this ruling that the appeal was taken to the Circuit Court. We refer again to page 11 of the opinion of the Court of Appeals (quoted at length supra, pages 11 and 12) where the Court said it was convinced that the Pennsylvania law was in accord with the proposition that despite any possibility that Dr. Kelly was an independent contractor, petitioners would be liable by reason of the representation of Kelly's status to Brown. Although the Circuit Court disagreed with the District Court on the question of whether Dr. Kelly was an independent contractor it placed its decision squarely on the Court's error in ruling on the question which had been submitted to the jury. The mere fact that the Circuit Court discussed an alternative basis for liability does not invalidate its decision on the issue which even petitioners must admit was properly before the Court.

The second answer to this part of petitioners' brief is that actually the alternate theory of petitioners' liability was probably very properly before the Court of Appeals. That alternate theory was that Dr. Kelly was

actually the petitioners' servant. Petitioners argue that respondent made no request to the District Court to instruct the jury concerning that alternate theory and consequently there could be no appeal on that question. In so arguing petitioners completely lost sight of the purpose and intent of Rule 51 which is simply to require that there be a final ruling by the lower court before an appeal can be taken. There was such a ruling in this case. At the close of respondent's case petitioners moved for a directed verdict. The Court heard argument on whether that issue should be submitted and ruled conclusively that it would not. See page 435 of the Testimony where the Court stated after strenuous argument from both sides on the point:

> "... I'm not going to submit any question of independent contractor because it is a matter of law under the undisputed evidence in this case. My opinion is that Dr. Kelly was an independent contractor."

We find it hard to conceive a more definite and final ruling by a trial court. That such a ruling is and may be deemed an adequate basis for an appeal is supported by Volume 5, Moore Federal Practice page 2502, paragraph 51.03, as follows:

> "As a general rule, requests for instructions should be in writing and a party cannot complain of the Court's failure to give instructions not so requested. Nevertheless, an oral request has been held sufficient to preserve an issue on appeal *where it was clear that the party was asserting the particular contention and that the trial court would not have given the instruction.*"[14]

14. Emphasis added. That it was made clear to the court that respondent was asserting the alternate theory and that the court would not give the instruction is established in the record (T. 435).

We have read the cases cited in footnote 11 (page 23) of petitioners' brief and note that many of them refer to the purpose of the rule being the requirement of a final and definite ruling on the point in issue. We therefore, submit that in this case the Court of Appeals, might properly, had it chosen so to do, decided the case on this question.[15] However, whether it could have properly done so or not is immaterial, since the decision was rested on a point admittedly before the Court.

3. Where, as here, the Court of Appeals was convinced that the District Court's conception of local law was erroneous, the Court of Appeals was not at liberty to abdicate its responsibility of review in deference to such erroneous conception of the law.

Examination of that reason advanced by the petition conclusively demonstrates the total invalidity of the entire petition. Even if it is assumed that a rule exists in a minority of circuits requiring the affirmance of permissible decisions on local law by district judges and that that minority rule should be adopted in the other circuits the question still remains in each case as to what constitutes a permissible conclusion by the district judge. In every instance the Court of Appeals must determine whether the conclusion reached by the district judge is actually permissible under state law.

In the instant case, the Court of Appeals has clearly stated that it was convinced that the district judge's

---

15. There is even a third answer to petitioners contention. It is quite probable, that Rule 51 had no bearing whatever since the appeal was taken not on exception to the Court's erroneous instruction, but from its erroneous ruling on the motion for directed verdicts.

conception of the local law was erroneous. The Court of Appeals has not placed its decision on its own opinion of what the law *should* be, but upon its conviction concerning what the law is in Pennsylvania. See pages 9, 10 and 11 of the opinion of the Court. Note the language used. At page 9, the Court said:

> ". . . We are of the opinion that the Supreme Court of Pennsylvania would hold . . ."
>
> ". . . Conversely we do not see how a 'Medical Director' engaged as under the circumstances at bar, can be an independent contractor and the doctrine of the independent contractor seems completely inapplicable under the facts of the case at bar."

At page 10 the Court went on to say:

> ". . . there is another cogent factor which we think *would compel* the Courts of Pennsylvania to hold the defendants liable in the case at bar.
>
> ". . . *We are of the opinion that . . . the Courts of Pennsylvania would apply the doctrine of respondeat superior* . . ." (Emphasis added)

Thus, it is unequivocally stated that the Circuit Court was not making its ruling on the basis of what it thought the law should be but solely on the basis of what the Pennsylvania law is.

As previously noted, the conviction of the Court of Appeals with respect to the Pennsylvania law was not arrived at lightly, but upon the sound foundation of a well reasoned lower court opinion that was in accord with all available appellate data. Those decisions had not been adequately treated by the District Court. Under

such circumstances, it would have been clear error for the Court to abdicate its duty of reviewing the conclusions of the trial court and substituting the views of the trial judge for its own conviction concerning local law.

Even those circuits allegedly following the minority rule contended for by petitioners, tacitly admit that under such circumstances as were here presented the Court of Appeals had no alternative but to reverse the judgment of the trial court. Examination shows that the effect of those cases cited by petitioners as announcing the minority rule, are greatly weakened by the fact that the appellate court paying lip service to the rule, actually agreed with the trial court's conclusions concerning local law. See for example *Mast v. Illinois Central R. Co.*, 176 F. 26 157, 163 (C.A. 8) where the Court said:

> ". . . Our study of the Iowa cases has convinced us that the challenged rulings of the trial judge are in accord with Iowa law."

See also *Heikes v. New York Life Ins. Co.*, 171 F. 2d 460, 464 (C.A.8) which states:

> "In this case we think the District Court reached not only a permissible, but a correct conclusion."

The other cases relied on, for the most part at least, contain similar statements indicating only adherence to the minority rule where the appellate court agrees with the trial court's conclusions. Certainly none of them indicate that such a procedure should be followed where, as here, the Court of Appeals regards the conclusion of the trial judge as clearly erroneous.

4. There was complete diversity of citizenship between the plaintiff and all of the defendants against whom she proceeded and the Court below very properly ruled that Federal Court jurisdiction did exist.

Respondent, a citizen of Pennsylvania, sued four individuals all of whom were citizens of states other than Pennsylvania. Those four individuals were owners of a business enterprise which was operated, according to their representations, as a partnership. Respondent did not sue the partnership itself or any owner who was a resident or citizen of Pennsylvania. The Complaint and all other papers filed in this action up to and including the present petition shows that no judgment was claimed or could have been entered in respondent's behalf against anyone other than the four persons whom she has sued. The mere fact that the individuals sued might be partners does not under Pennsylvania law make the partnership itself a party to the action. In Pennsylvania the individual partner and the partnership itself are each considered separate and distinct jural entities: Pennsylvania Uniform Partnership Act of 1915 P.L. 18, 59 P.S. section 1, et seq. Rule 2128 (a) of the Pennsylvania Rules and Civil Procedure; 2 Goodrich-Amran, Civil Practice, Section 2128 (a) —1.

Under Section 37 (a) of the Uniform Partnership Act as adopted in Pennsylvania, the tort liability of partners may at the election of the plaintiff be treated as several and not joint. By naming as defendant only certain of the owners and omitting to name the others and the partnership itself, plaintiff clearly elected to proceed, in accordance with that act, solely on the basis of the individual liability of those parties named.

Under this Pennsylvania law it has long been recognized that neither the partnership entity nor all individual partners are necessary or essential parties to an action ex delicto versus other individual partners: *Baxter v. Wunder*, 89 Pa. Superior Court 585, (1926). There the Court held that the partners were liable severally and that the plaintiff if he elected, could sue any one or more of the individuals and ignore the others. That is exactly what was done here as the record plainly demonstrates. How other actualities can be referred to when no judgment has been rendered or could be rendered against any individual or entity other than those sued completely escapes us.

This self-same procedure has been followed and approved in other federal court cases governed by the Uniform Act. The very cases cited by petitioners so state. See *Darby v. Philadelphia Transp. Co.*, 73 F. Supp. 522, 523 (E.D. Pa.) where the court said:

> "... the plaintiff has the option of naming any of the members of the partnership, or the partnership entity, as the defendant, or may join any combination of partners and the partnership entity as defendants, the partnership itself being recognized as an entity, separate and distinct from its members ..."

Thus, the petitioners own case destroys their argument. The fact that in that case the plaintiff did name the partnership entity which had local citizenship and thus destroyed the necessary diversity of citizenship does not alter the clear import of the opinion. In the present case the plaintiff did not name the partnership as a party and its domicile is therefore immaterial.

Exactly the same thing is true of the other case cited by petitioners: *Remington's Dairy v. Rutland Ry. Corp.*, 15 F.R.D. 489, 20 F.R.S. 251 (D. Vt.) There the plaintiff itself was a partnership entity and its domicile was determinative of the citizenship question.

In *Weaver v. Marcus et al.*, 165 F. 2d 862 (C.A.4) (1948), is clear authority for the position taken by respondent and the district and appellate judges in this case. In that case, the plaintiff had actually designated the defendants individually and as co-partners trading and doing business as "Marcus Brothers". Yet at page 866 the Court stated:

> "The Court in its discretion may proceed in an action without making such persons parties if . . . their joinder would deprive the Court of jurisdiction of the parties before it; . . " .

See also the authorities cited in that opinion including *Soberg v. Sanders*, 243 Mich. 429, 220 N.W. 781; *Mechems Elements of Partnership* (2d Ed. 1920) Section 312, pages 276, 277; and *Crane on Partnership* (1938) 276.

This problem was completely dealt with in the instant case by the District Court, its opinion being reported as *Brown v. Ingraham*, 11 F.R.D. 522 (W.D. Pa. 1951). There have been no cases cited by petitioners or discovered by respondent which hold to the contrary.

It is most significant to note that despite the fact that plaintiff never named the partnership itself as a party, the petitioners now speak of the actualities of the litigation. We note that in a brief filed in the District Court on June 16, 1953, this same counsel for petitioners stated (page 3):

"In this particular case, the subject matter of the pending action is *the alleged negligence of the defendants as individuals* in their ownership and operation of the Mercer Sanitarium. *There is no allegation made against any of the defendants as possible partners. The defendants have been sued only as individuals. A partnership is not mentioned in either the Complaint or the Amended Complaint.* (Emphasis added)

This observation was made nearly three years after the action was filed. Now, however, petitioners choose to change the pleadings and their interpretation of the pleadings and say that action was brought against additional parties.

The averment that no harm would result to respondent or her children if this action were terminated to her prejudice seems entirely inappropriate to the present considerations. In reply we, therefore, merely say that the state action was filed as a cautionary measure after a suit was first filed in the federal court, and that when the state action was called for trial, respondent in accordance with Pennsylvania law, elected to take a voluntary non-suit which the Court of Mercer County, contrary to law refused to enter.

CONCLUSION

The only questions or issues raised by the entire petition actually are, despite feverish efforts to make them something more, merely questions of local law. Those questions of local law have been decided by the Court of Appeals, and in most instances also by the District Court, completely in accord with the Pennsylvania authorities in the exact manner established and prescribed by this Court. Petitioners only real quarrel on each and every issue attempted to be raised is solely with the law of Pennsylvania as it clearly exists.

This Court should, therefore, put an end to this protracted litigation by denying the Writ requested and remanding the case so that judgment may finally be entered in behalf of respondent and her sons in accordance with the jury's verdicts.

Respectfully submitted,

EDWARD O. SPOTTS
MELVIN M. BELL
THEODORE M. TRACY
Attorneys for Respondent